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In the Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

ANGELO J. SOLIMINO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether, in a federal court action under the Age Discrimination in Employment Act, state agency findings of fact that have not been judicially reviewed have preclusive effect.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether, in a federal court action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, common law principles of preclusion apply to state agency findings that have not been judicially reviewed. The Court's resolution of this question will affect administration and enforcement of the ADEA.

The United States and the Equal Employment Opportunity Commission (EEOC) have a substantial interest in the interpretation and enforcement of federal laws prohibiting employment discrimination, including the ADEA. The EEOC is the federal

agency primarily responsible for administering the ADEA. In carrying out its responsibilities, the EEOC has entered into worksharing agreements with 46 state and local agencies that have authority to enforce state and local laws prohibiting age discrimination in employment. Under a typical agreement, the EEOC refers certain age discrimination claims to state and local agencies. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988) (describing worksharing agreements under Title VII). The EEOC believes that such agreements further Congress's intent to afford the States an opportunity to resolve age discrimination complaints promptly and without undue inconvenience or expense. The agreements also conserve the EEOC's limited enforcement resources.

The EEOC's decision to enter into worksharing agreements under the ADEA was based on its understanding that judicially unreviewed determinations by state agencies have no preclusive effect in subsequent actions under the ADEA or in proceedings before the EEOC. The EEOC takes the position that state agency factfinding should be accorded substantial weight, but not preclusive effect. If the Court were to adopt petitioner's position in this case, the EEOC would be compelled to consider modifying or abandoning its worksharing agreements under the ADEA.

In our view, application of common law rules of preclusion under the ADEA to judicially unreviewed determinations of state agencies would be inconsistent with the language and purpose of the ADEA, would interfere with the EEOC's exercise of its enforcement responsibilities, and would undermine private enforcement. Accordingly, we believe that the decision of the court of appeals is correct.

STATEMENT

1. Petitioner Astoria Federal Savings and Loan Association employed respondent Angelo J. Solimino from October 4, 1945 until March 5, 1982. On March 5, 1982, petitioner terminated respondent's employment as Vice President of the Mortgage Origination Department. Respondent was 63 years old at the time. J.A. 141-142.

On March 18, 1982, respondent filed a charge of age discrimination with the EEOC. J.A. 141. Pursuant to a worksharing agreement between the EEOC and the New York State Division of Human Rights (DHR), the EEOC referred respondent's case to the DHR for investigation and attempted resolution under the New York Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* (McKinney 1982 & Supp. 1990). Pet. App. A3.

On January 25, 1983, following a hearing at which petitioner and respondent each were represented by counsel, the DHR dismissed respondent's complaint, finding that the record before it contained no evidence that respondent's employment was terminated because of his age. J.A. 89-91. Respondent requested review of the DHR's decision by the New York State Human Rights Appeal Board. J.A. 130. On May 30, 1984, the Board affirmed the DHR's decision, concluding that the DHR's dismissal of respondent's complaint "was not arbitrary, capricious, or characterized by an abuse of discretion."[1] J.A. 96-97. The

[1] Petitioner asserts that "[t]he DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state laws." Pet. Br. 4 n.2. Although the court of appeals' opinion states that the DHR treated the case "as a potential violation of both the ADEA and New York State Human Rights Law," Pet. App. A3, the DHR's

Board's notice to respondent informing him of its decision stated that he might lose his right to proceed in federal court if he elected to appeal the state administrative determination in state court. J.A. 95 (citing *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982)). Solimino did not seek judicial review of the Board's decision.[2] Pet. App. A4.

2. On February 21, 1985, respondent filed an action in the United States District Court for the Eastern District of New York alleging that petitioner had discriminated against him on the basis of age, in

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Determination and Order stated only that respondent's complaint charged a violation of New York law. J.A. 89. And the Appeal Board stated that it was discharging its "narrow function" under the State Human Rights Law. J.A. 96. Consequently, there is no basis for petitioner's suggestion that the DHR or the Appeal Board decided respondent's claim under the ADEA. Although this case therefore involves only issue preclusion, petitioner's arguments would appear to apply equally to claim and issue preclusion.

[2] Under the law then in effect, judicial review of Board decisions was available in the Appellate Division of the New York State Supreme Court. 1984 N.Y. Laws ch. 83, § 3. The Appellate Division accorded the DHR's findings of fact conclusive effect "if supported by sufficient evidence on the record considered as a whole." *Ibid.* The Board was abolished in 1984, subsequent to its affirmance of the DHR decision in this case. 1984 N.Y. Laws ch. 83, § 2. Judicial review of DHR decisions is now obtained by initiating a proceeding in the New York Supreme Court for the appropriate county. N.Y. Exec. Laws § 298 (McKinney 1982 & Supp. 1990). As before, the DHR's findings of fact are conclusive "if supported by sufficient evidence" in the record. *Ibid.*

Although respondent did not appeal the DHR's disposition of his age discrimination claim, he filed an action in state court alleging various other causes of action, including wrongful termination, prima facie tort, perjury and conspiracy. The state court dismissed this action for failure to state a claim. J.A. 99-102.

violation of the ADEA, by denying him salary increases and promotions, and by terminating him. J.A. 142. Petitioner moved for summary judgment, arguing that respondent's action was precluded by the DHR's dismissal of his complaint and by the statute of limitations. Pet. App. A4.

The district court granted summary judgment for petitioner on the ground that respondent's action was precluded by the DHR's determination.[3] J.A. 156-157. The district court noted that two courts of appeals had reached opposite conclusions on the question whether judicially unreviewed agency factfinding has preclusive effect in actions under the ADEA. J.A. 146 (citing *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir. 1988); *Duggan* v. *Board of Education*, 818 F.2d 1291 (7th Cir. 1987)).[4] The court observed that this conflict arose from "divergent interpretations of

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[3] The district court declined to grant summary judgment on the statute of limitations issue because it concluded that there were disputed issues of fact concerning the date on which the cause of action accrued. J.A. 145. That issue is not before this Court. Pet. Br. 6 n.5.

[4] See also *Delgado* v. *Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987) (finding arguments for denying preclusion "persuasive"); *Mack* v. *South Bay Beer Distrib., Inc.*, 798 F.2d 1279 (9th Cir. 1986) (assuming, without argument, that unreviewed state administrative decision could have preclusive effect). The district courts are also divided. Compare *Heckman* v. *State University*, 737 F. Supp. 177 (N.D.N.Y. 1990) (no preclusion) and *Ibrahim* v. *New York State Department of Health*, 692 F. Supp. 1471 (E.D.N.Y. 1988) (same) with *Garner* v. *Unicare Health Facilities, Inc.*, 651 F. Supp. 422 (E.D. Wis. 1987) (preclusion); *Corrente* v. *St. Joseph's Hosp. & Health Center*, 730 F. Supp. 493 (N.D.N.Y. 1990) (assuming unreviewed state administrative decision can have preclusive effect); and *Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334 (S.D.N.Y. 1988) (same).

[this Court's] decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986)." J.A. 147. The district court's analysis largely adopted the Eighth Circuit's approach in *Stillians*.

The district court understood *Stillians* to "expand[] upon [a] concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident." J.A. 148. This presumption, in the court's view, could be overcome only by statutory language or legislative history that (1) "actually addresses" whether facts found by an agency but not reviewed by a court are to have preclusive effect, and (2) "accords them something less than preclusive effect." *Ibid.* Applying this test, the court concluded that judicially unreviewed administrative agency factfinding has preclusive effect under the ADEA. The district court observed that the ADEA does not "contain[] any provision—like the 'substantial weight' provision of Title VII."[5] J.A. 154. The court deemed irrelevant the provisions in the ADEA that provide for state agency proceedings to be superseded by actions under the statute (29 U.S.C. 633(a)) and that permit concurrent investigations of discrimination claims by state agencies and the EEOC (29 U.S.C. 633(b)). In the district court's view, these "statutory deferral mechanisms [were] not an accurate indicator of Congressional intent." J.A. 154.

[5] Title VII's "substantial weight" provision requires the EEOC to "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b).

The court further held that the DHR's proceedings satisfied the requirements for administrative preclusion. The DHR acted in a judicial capacity, gave the parties an adequate opportunity to litigate disputed facts, and made findings of fact that would be accorded preclusive effect in state courts. J.A. 155-156. Finally, the court held, DHR's factual findings precluded respondent from proving a violation of the ADEA. J.A. 156-157.

3. The court of appeals reversed and remanded. Pet. App. A1-A13. The court viewed the issue as one of congressional intent. *Id.* at A6. It rejected the notion that "the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." *Id.* at A12. Although "the presence of the [substantial weight] provision is dispositive because logically incompatible with preclusion," *id.* at A12, n.7, "other considerations may also justify the conclusion that Congress intended no preclusion." *Ibid.*

One such consideration, the court said, is the ADEA's deferral mechanism. Section 14(b) of the ADEA provides that grievants may not file suit "before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated." Pet. App. A6 (quoting 29 U.S.C. 633(b)). The court found further evidence that Congress did not intend preclusion in the ADEA provisions that permit state agencies and the EEOC to investigate discrimination complaints concurrently or subsequently. *Ibid.* (citing 29 U.S.C. 626(d) and 633(b)). "If Congress had intended preclusion from judicially unreviewed state agency findings, * * * 'the concurrent or subsequent EEOC investigation would be superfluous.'" Pet. App. A6-A7 (quoting *Duggan*, 818 F.2d at 1295).

In addition, the court determined that preclusion would be inconsistent with the purpose of Section 14(a), which provides that "upon commencement of action under this chapter such action shall supersede any State action," 29 U.S.C. 633(a). The court of appeals observed that "Congress enacted the sixty-day deferral mechanism * * * 'to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings.'" Pet. App. A7 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979) (emphasis added by the court of appeals)). These provisions of the ADEA, the court concluded, showed that Congress did not intend to bar federal court consideration of complaints that were not settled to the grievant's satisfaction. Pet. App. A7-A8. Additionally, the court of appeals found support for its interpretation in the EEOC's practice of referring certain age discrimination charges to state agencies for investigation. *Id.* at A9. The court considered it unlikely that "a grievant who is obligated to file a complaint with the EEOC * * * and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed [state agency] decision." *Id.* at A10.

In addition to examining the ADEA, the court of appeals looked to principles enunciated by this Court in construing Title VII, 42 U.S.C. 2000e *et seq.* The court of appeals observed that in *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. at 470 n.7, this Court indicated "that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings

of the EEOC." Pet. App. A8. The Court in *Kremer* also stated that "unreviewed administrative determinations by state agencies * * * should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." Pet. App. A9 (quoting *Kremer*, 456 U.S. at 470 n.7). These principles, the court of appeals determined, "apply as well to ADEA cases."[6] *Ibid.*

As to the absence of a counterpart to Title VII's "substantial weight" provision, the court of appeals observed that Congress added that provision to Title VII in 1972 because it concluded that the EEOC was not according sufficient weight to state agency findings. Pet. App. A12-A13 (citing *Kremer*, 456 U.S. at 474-475 & n.16). In contrast, when Congress amended the ADEA in 1986, the EEOC was already according substantial weight to state agency findings in age discrimination cases as a matter of administrative policy. Pet. App. A13. Congress's failure to add a "substantial weight" provision to the ADEA therefore was consistent with the view that unreviewed agency findings do not have preclusive effect. *Id.* at A13 n.9.

The court noted that the EEOC shared its view, and that the EEOC's interpretation was entitled to

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[6] In the court of appeals' view, the differences between the ADEA and Title VII indicate that principles regarding preclusion enunciated in the Title VII context apply *a fortiori* when interpreting the ADEA. Pet. App. A10-A11. The court noted that (1) ADEA grievants are required to wait less time than Title VII grievants between commencing state agency proceedings and filing an action under the federal statute; and (2) under Title VII, state agencies enjoy an initial period of exclusive jurisdiction over Title VII claims that they are not afforded under the ADEA. *Id.* at A11.

deference in light of the agency's responsibility for enforcing the ADEA. Pet. App. A12 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). Deference was particularly appropriate, the court noted, because the EEOC adopted this interpretation prior to 1986, when Congress amended the ADEA extensively but did not disturb that interpretation. Pet. App. A12, A13 n.9 (citing EEOC Compl. Man. (CCH) ¶ 285 (May 1985)).

SUMMARY OF ARGUMENT

The court of appeals correctly applied the analytical framework of *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986), to conclude that common law rules of preclusion do not apply to judicially unreviewed state agency determinations in actions under the ADEA. In *Elliott*, this Court looked to the language and legislative history of the particular statutes at issue to determine whether applying common law rules of preclusion to judicially unreviewed state agency determinations "would be consistent with Congress' intent." *Id.* at 796. The district court was incorrect in deriving from *Elliott* a general rule that common law principles of preclusion apply unless Congress "actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect." Pet. App. A21. Nor is petitioner correct in asserting that, under *Elliott*, indications that Congress did not intend common law rules of administrative preclusion to apply under a particular statute must be "unequivocal" or "explicit." *Ibid.* Petitioner's formulation would be more appropriate if the question were whether to accord preclusive effect to the decisions and records of state courts, because 28 U.S.C. 1738 provides that such judgments and records are to be given preclusive effect. In contrast, the Court's analysis in *Elliott* indicates that the question whether common law rules of preclusion apply under a particular statute to administrative determinations is an ordinary question of statutory interpretation that does not call for application of a "clear statement" rule.

In any event, the language and structure of the ADEA clearly indicate that application of the common law rules of preclusion to unreviewed state determinations in actions under the ADEA would be inconsistent with Congress's intent. See Pet. App. A21. First, Section 14(b) of the ADEA provides that, where a state agency is authorized to consider claims of age discrimination, a grievant may not file an action under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." 29 U.S.C. 633(b). The language of this provision indicates that Congress intended grievants to be able to bring suit under the ADEA after a state administrative proceeding has terminated in a decision adverse to the grievant. Moreover, this Court has recognized that the purpose of Section 14(b) is to "screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979). Foreclosing judicial review of age discrimination claims that are not settled to the grievant's satisfaction would defeat this purpose. Similarly, there would be no reason for Congress to have authorized grievants to file charges with the EEOC within 30 days after the termination of state pro-

ceedings, 29 U.S.C. 626(d)(2), if the unreviewed determinations of state administrative agencies were entitled to preclusive effect.

It is true that the ADEA contains no counterpart to Section 706(b) of Title VII, which directs the EEOC to give "substantial weight" to findings of state and local agencies. 42 U.S.C. 2000e-5(b). But the absence of such a provision does not decide the question presented here. Section 706(b) was only one of the factors the Court considered in *Elliott*. Moreover, Congress added Section 706(b) to Title VII in 1972 because it believed the EEOC was not giving sufficient weight to the findings of state and local agencies. By the time Congress enacted amendments to the ADEA in 1986, the EEOC had adopted a policy of according substantial weight to state and local agency findings on age discrimination claims. Thus, Congress had no reason to enact a counterpart to Section 706(b), because the EEOC had adopted a "substantial weight" rule on its own.

Preclusion also is inconsistent with Congress's intent to allow *de novo* judicial review of ADEA claims. The Court relied on *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) in deciding the parallel question under Title VII (see *Elliott*, 478 U.S. at 796). The courts of appeals uniformly hold that the rule of *Chandler* is applicable under the ADEA, and a federal statute (5 U.S.C. 7703(b)(2)) expressly allows federal employees to file actions under the ADEA following adverse administrative decisions.

Denying preclusive effect to unreviewed state agency determinations would not reduce state proceedings to insignificance. Grievants who are satisfied by state administrative proceedings have no reason to bring a federal action. Grievants whose claims are rejected after fair proceedings may decide

to accept the outcome as reasonable and forgo further litigation. Grievants who bring suit may stipulate to facts found by the state administrative agency. And if they do not, administrative findings generally are admissible under Fed. R. Evid. 803(8)(C). On the other hand, if administrative determinations had preclusive effect, grievants who were in doubt about the outcome of state proceedings would be encouraged to abandon them as soon as the sixty-day period had expired.

Although denying preclusive effect to unreviewed state agency determinations may result in duplicative litigation—the result of any decision denying preclusive effect—that policy choice was Congress's to make. Congress chose to provide for *de novo* judicial consideration of ADEA claims.

ARGUMENT

UNREVIEWED STATE AGENCY DETERMINATIONS DO NOT HAVE PRECLUSIVE EFFECT IN AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Common Law Rules of Preclusion Do Not Apply if Preclusion Is Inconsistent With Congressional Intent

In *University of Tennessee* v. *Elliott*, *supra*, this Court held that common law rules of preclusion apply to unreviewed state agency determinations in actions under 42 U.S.C. 1983, but not to actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In this case, the court of appeals correctly applied the analytical framework of *Elliott* to conclude that principles of preclusion do not apply to unreviewed state agency determinations in actions under the ADEA.

This Court framed the question in *Elliott* as whether applying "a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and Section 1983]."[7] 478 U.S. at 796. The Court observed that it had "frequently fashioned common-law rules of preclusion," *id.* at 794, and proceeded to consider "whether a rule of preclusion [was] appropriate" in actions under the two statutes at issue. *Id.* at 795.

In determining that Congress did not intend common law rules of preclusion to apply to unreviewed state determinations under Title VII, the Court relied in part on its decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* held that a federal employee whose Title VII claim was rejected by her employing agency following an administrative hearing was entitled to a trial *de novo* in federal court. In reaching that conclusion, the Court in *Elliott* observed, *Chandler* considered both the language and the legislative history of the 1972 amendments to Title VII. 478 U.S. at 795. The Court in *Elliott* also relied on its earlier statement in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), that the legislative history "manifests a congressional intent" to allow grievants to pursue independently their rights under both Title VII and other applicable statutes. 478 U.S. at 796 n.5.

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[7] The Court rejected the contention that preclusion presumptively applies to state administrative determinations, noting that the presumption against implied repeal of statutes does not arise in this context because 28 U.S.C. 1738, which governs the preclusive effect to be accorded the judgments and records of state courts, does not apply to administrative determinations that have not been judicially reviewed. 478 U.S. at 794.

In analyzing the preclusion question under Section 1983, the Court quoted its statements in *Allen* v. *McCurry*, 449 U.S. 90 (1980) (made in the course of a determination that 28 U.S.C. 1738 applies in actions under 42 U.S.C. 1983) that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion," and "the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." 478 U.S. at 797 (quoting 449 U.S. at 97-98). The Court saw "no reason to suppose" that, in enacting Section 1983, Congress "wished to foreclose the adaptation of traditional principles of preclusion to * * * the burgeoning use of administrative adjudication in the 20th century." 478 U.S. at 797.

We disagree with petitioner's suggestion (Pet. Br. 11-13) that the Court adopted an across-the-board "clear statement" rule in *Elliott*. There is no basis in *Elliott* for petitioner's assertions that common law rules of claim and issue preclusion apply absent "unequivocal direction" from Congress (Pet. Br. 11) or an "explicit showing of Congressional intent" (*id.* at 13) to the contrary. Rather, as petitioner itself recognizes at one point (*id.* at 12), *Elliott* approached the preclusion question as an ordinary issue of statutory interpretation, calling for examination of the language and legislative history of the statute at issue to determine whether application of common law rules of preclusion to administrative determinations "would be inconsistent with Congress' intent." 478 U.S. at 796. The "clear statement" language on which petitioner relies was drawn from *Allen* v. *McCurry*, *supra*, where the question was whether Congress had somehow repealed 28

U.S.C. 1738 in enacting Section 1983. As both the Court's analysis and its holding in *Elliott* indicate, no such clear statement is required when the question is simply whether Congress intended common law preclusion to apply.

Similarly, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), also cited by petitioner (Pet. Br. 10), does not establish a general rule requiring federal courts to give preclusive effect to all state administrative determinations. *Utah Construction* addressed the preclusive effect of a particular agency's factual determinations under a particular statutory regime. See 384 U.S. at 421 ("the decision here rests upon the agreement of the parties as modified by the Wunderlich Act"). *Utah Construction*, like *Elliott*, indicates that the preclusion analysis turns on the congressional intent underlying a particular statutory regime. *Id.* at 421 n.18. See Restatement (Second) of Judgments § 83 (3) and (4) (1982) (administrative preclusion inappropriate where "the scheme of remedies permits assertion of second claim notwithstanding the adjudication of the first claim," or where preclusion "would be incompatible with a legislative policy."); 4 K. Davis, *Administrative Law Treatise* § 21.5 (2d ed. 1983). See also *Brown* v. *Felsen*, 442 U.S. 127, 136 (1978) (applying claim preclusion in bankruptcy proceedings would be inconsistent with congressional intent).[8]

[8] Petitioner cites the general rules of statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986), and that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Pet. Br. 11 (quoting *Stillians*, 843 F.2d at 280). Here, the question is not whether to change the common law rules of preclusion, but whether to apply those rules under a particular statute. Moreover, the ADEA did not "invade" the common law (as the statute at issue in *Isbrandtsen* invaded the general maritime law), but rather created new statutory remedies for age discrimination in employment.

B. Preclusion Is Inconsistent With the Language and Structure of the ADEA

Section 14(b) of the ADEA provides that grievants in "deferral States" (in which state agencies are authorized to redress claims of age discrimination in employment) may not file an action under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated."[9] A grievant who prevails in state administrative proceedings has no reason to bring an action in federal court. Consequently, the plain language of Section 14(b) indicates that Congress intended to allow grievants to bring an action under the ADEA after state administrative proceedings

[9] Section 14(b) provides:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law.

29 U.S.C. 633(b).

have terminated in a decision adverse to the grievant.

This reading of the language of the ADEA's deferral provision is consistent with its purpose. In *Oscar Mayer & Co.* v. *Evans*, the Court noted that Section 14(b) "is almost *in haec verba* with § 706 (c) of Title VII." 441 U.S. at 756. The Court concluded that the two provisions were intended to "screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings." *Ibid.* (emphasis added). According preclusive effect to unreviewed agency proceedings would defeat this purpose by foreclosing judicial review of claims that were *not* settled to the grievant's satisfaction in state administrative proceedings.[10]

Similarly, Section 7(d)(2) of the ADEA, 29 U.S.C. 626(d)(2), provides that a grievant in a

[10] Petitioner broadly asserts (Pet. Br. 17, 24) that the ADEA should not be compared to Title VII. But this Court repeatedly has observed that the substantive, as well as some of the procedural, provisions of the ADEA are derived from Title VII. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer*, 441 U.S. at 755; *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); see also *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990). It is true that rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* 29 U.S.C. 626(b). But "the remedial provisions of [the ADEA and the FLSA] are not identical," *Trans World Airlines* v. *Thurston*, 469 U.S. at 125. In particular, Section 14(b) of the ADEA is derived "almost *in haec verba*" from Title VII rather than the FLSA. *Oscar Mayer*, 441 U.S. at 756. Thus, in the context of this case, reliance on decisions under Title VII is appropriate.

State with an age discrimination law must file a charge with the EEOC "within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receipt by the individual of notice of the termination of proceedings under State law, whichever is earlier." If Congress had intended unreviewed state administrative determinations to have preclusive effect, it would have made little sense to provide for the filing of charges with the EEOC following termination of state proceedings. At that point, review by the EEOC would be largely or wholly "superfluous."[11] See *Duggan*, 818 F.2d at 1295.

Petitioner is wrong in asserting (Pet. Br. 22, 26) that, under its view of preclusion, grievants would always have an opportunity to decide whether to pursue an action under the ADEA in federal court. Under Section 14(b), grievants in deferral States are required to commence state proceedings. See *Oscar Mayer*, 441 U.S. at 755 (grievants do not have an option whether to resort to state proceedings). Moreover, grievants who file complaints with the EEOC cannot prevent the EEOC from referring their complaints to a state or local agency under a work-

[11] Section 7(d)(2) of the ADEA generally parallels Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). Title VII's deferral provision provides for a 60-day period of exclusive state jurisdiction. The ADEA, in contrast, allows grievants to proceed either concurrently or consecutively in both state and federal administrative agencies. See *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990). To the extent this difference is relevant here, it suggests that Congress was less inclined to defer to state agencies under the ADEA than under Title VII. See *Duggan*, 818 F.2d at 1295-1296.

sharing agreement between the EEOC and the State. If the state agency decides the age discrimination claim within the 60-day period provided by Section 14(b), under petitioner's view, principles of preclusion would prevent the grievant from ever obtaining *de novo* review in federal court. Although petitioner asserts (Pet. Br. 20) that 60 days is "scarcely enough time to permit the EEOC or the state agency to explore voluntary conciliation," Congress in fact expected state agencies to decide many discrimination complaints in sixty days or less—that is why it chose sixty days as the deferral period. See *Oscar Mayer*, 441 U.S. at 757-758 (quoting 110 Cong. Rec. 13,087 (1964) (statement of Sen. Dirksen) ("at the local level * * * many cases are disposed of in a matter of days, and certainly not more than a few weeks.")). Thus, petitioner is incorrect in surmising (Pet. Br. 20-21) that Section 14(b)'s reference to "earlier terminated" proceedings refers only to proceedings in which the state agency does not make findings of fact or a determination on the merits.

Petitioner also advances the iconoclastic argument that the ADEA does not authorize state agencies to make findings of fact or determinations of the merits without the grievant's consent, and that therefore grievants should be bound by any such findings.[12] See Pet. Br. 23-25. This argument is flawed in several

[12] It has been the EEOC's practice since 1987 to issue written determinations on ADEA charges similar to its written determinations on Title VII charges. See EEOC Compl. Man. (CCH) ¶ 255 (1988). From 1981 until 1987, the EEOC issued "letters of violation" when it determined that ADEA charges had merit and "closure letters," which did not discuss the merits, when it determined that ADEA charges lacked merit. See EEOC Compl. Man. (CCH) ¶¶ 204, 240 (1981). Prior to 1978, the Secretary of Labor had responsibility for enforcing the ADEA. It is our understanding that the Secretary issued no written determinations of age discrimination charges.

respects. The ADEA provides that the EEOC is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. 626(d), to investigate and keep appropriate records, Section 626(a), and to bring actions to enforce the rights of employees under the ADEA, Section 626(b)-(c). In order to carry out these functions, the EEOC —and the state agencies with which the EEOC is authorized to share enforcement responsibility, see 29 U.S.C. 625(b)—must make an informal determination of the merits of age discrimination complaints. Factfinding by the EEOC or a state administrative agency may reduce the areas of disagreement between employer and employee, and therefore is a useful and appropriate method of conciliation. If anything, the fact that the ADEA, unlike Title VII, does not expressly provide for formal findings by administrative agencies suggests that according preclusive effect to such findings would be even less appropriate under the ADEA than under Title VII. In any event, nothing in the ADEA purports to bar state agencies from entering findings of fact pursuant to their authority under *state* law.

The deferral provisions of the ADEA strongly indicate that Congress did not intend to apply common law rules of preclusion to unreviewed state agency determinations. As the Seventh Circuit observed in *Duggan*, "[g]iven the multiple forums provided for in Title VII and the ADEA and the place of the state agency and EEOC in the process as informal agents of reconciliation, it is unlikely that Congress

intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." [13] 818 F.2d at 1295. And as this Court observed in *Oscar Mayer*, "[p]rior resort to the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive." 411 U.S. at 764. [14]

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[13] The district court believed that, if Solimino had brought an age discrimination action in state court, DHR's judicially unreviewed ruling would have been accorded preclusive effect under state law. Pet. App. A28-A29 (citing *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987)). Assuming this is so, it does not resolve the question whether Congress intended to accord such findings the same effect in federal court. As this Court observed in *Kremer* with respect to Title VII, "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review *even if such a decision were to be afforded preclusive effect in a State's own courts.*" 456 U.S. at 470 n.7 (emphasis added).

[14] Section 14(a) of the ADEA provides that "upon commencement of action under this chapter such action shall supersede any State action." 29 U.S.C. 633(a). Petitioner incorrectly asserts (Pet. Br. 20) that once a state administrative agency renders a final decision, there is no longer any "State action" to supersede. It is clear both from the plain language of Section 14(a) and the legislative history that Congress intended the filing of an action under the ADEA to supersede pending state court proceedings as well as pending administrative proceedings. See S. Rep. No. 723, 90th Cong., 1st Sess. 6 (1967) (Section 14(a) would affect "suits in * * * State courts"). In New York, as in most States with laws prohibiting age discrimination in employment, a grievant is entitled to state court review of state administrative determinations. See note 2, *supra*. Thus, petitioner's approach would lead to the bizarre result that grievants who wished to file actions in federal court following the adverse decision

Section 706(b) of Title VII requires the EEOC to give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b). In *Elliott*, this Court recognized that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." 478 U.S. at 795 (citing *Kremer*, 456 U.S. at 470 n.7). True enough. But the absence of such a provision from the ADEA does not compel a contrary conclusion. Section 706(b) of Title VII was just one of the factors that the Court relied on in *Elliott*. See 478 U.S. at 795-796. In this case, other factors—the ADEA's deferral provisions, and the fact that Congress intended grievants to be able to obtain *de novo* judicial review of age discrimination claims, see pp. 24-26, *infra*—lead to the conclusion that unreviewed administrative determinations have no preclusive effect under the ADEA.

The district court was mistaken in reasoning that "had Congress wanted to demonstrate an intent to displace common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII." J.A. 155. Congress added Section 2000e-5(b) to Title VII by amendment in 1972 for the purpose of increasing the deference paid to state agency decisions. *Kremer*, 456 U.S. at 470 n.8. Prior to the amendment, the Court noted, the EEOC was

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of a state agency could do so only by filing a purely protective petition for review in state court (to keep their state action alive), and then immediately filing in federal court, before any decision in state court.

"free to ignore state administrative decisions." *Id.* at 475 n.16. See also *Duggan*, 818 F.2d at 1297.

In 1982, well before Congress enacted the 1986 amendments to the ADEA, the EEOC adopted a policy of according substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims. See EEOC Order 916, App. C: ADEA Contract Rev. Man. (Apr. 1982); EEOC Compl. Man. (CCH) ¶ 285 (May 1985). Thus, Congress had no reason to enact a counterpart to Title VII's substantial weight provision, because the EEOC already accorded substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims as a matter of administrative policy. In this instance at least, Congress followed the common-sense aphorism of not fixing something that was not broken. Indeed, the lack of congressional action suggests, if anything, that Congress acquiesced in the EEOC's administrative practice. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

C. Preclusion Is Inconsistent With the Congress's Intent To Allow *De Novo* Judicial Review of ADEA Claims

In *University of Tennessee* v. *Elliott*, this Court concluded that applying common law rules of preclusion to unreviewed administrative determinations in a Title VII case "would be contrary to this Court's holding in *Chandler*" that federal employees with Title VII claims are entitled to *de novo* review of their claims in federal court. 478 U.S. at 796. The same argument applies under the ADEA. The courts of appeals have held that employees, both federal and non-federal, are entitled to *de novo* review of their ADEA claims following an adverse administrative decision. See *Rosenfield* v. *Department of the Army*, 769 F.2d 237, 239 (4th Cir. 1985) (federal

employees); *Nabors* v. *United States*, 568 F.2d 657, 660 (9th Cir. 1978) (same); *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 640 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986) (private employees); *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 548 (9th Cir. 1983), aff'd, 472 U.S. 400 (1985) (same); *EEOC* v. *County of Calumet*, 686 F.2d 1249, 1253-1256 (7th Cir. 1982) (same). In addition, Congress has provided expressly that federal employees who litigate age discrimination claims before the EEOC and the Merit Systems Protection Board have a right to a trial *de novo* in ADEA actions. See 5 U.S.C. 7703(b)(2).[15]

In sum, petitioner is wrong in asserting (Pet. Br. 17) that examination of the ADEA yields "mere silence" on the preclusive effect to be accorded to unreviewed state administrative determinations. The ADEA's deferral provisions, as well as the principle

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[15] The legislative history of the ADEA further reinforces the conclusion that Congress intended to allow grievants to obtain judicial determinations of age discrimination claims. Initial proposals for a federal age discrimination statute provided for administrative enforcement, with only appellate review by the courts. This procedure was replaced by the judicial enforcement scheme adopted in the ADEA. See 113 Cong. Rec. 7076 (1967). In addition, the legislative history suggests that Congress enacted the ADEA because it concluded that state age discrimination laws were ineffective or inadequately enforced. See 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits); *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964, at 10, 21 (1965), *reprinted in* EEOC, *Legislative History of the Age Discrimination Act of 1967*, at 27, 38 (1981). In view of this legislative history, it is implausible that Congress intended to allow unreviewed state administrative determinations to foreclose judicial review.

that grievants are entitled to *de novo* judicial review of claims under the ADEA, demonstrate that application of common law rules of preclusion would be inconsistent with the statutory scheme enacted by Congress. In any event, the EEOC's determination that state administrative findings are not preclusive under the ADEA is a reasonable interpretation of the statute and as such is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

D. Petitioner's Policy Arguments Should Not Be Substituted for the Requirements of the ADEA

Contrary to the Eighth Circuit's view (*Stillians*, 843 F.2d at 282), denying preclusive effect to unreviewed state agency determinations does not reduce state agency proceedings to nothing more than "an opportunity for the [grievant] to test his case." Grievants who prevail in state agency proceedings will have no reason to bring an action in federal court. Grievants who lose in state administrative proceedings that they perceive to be fair may decide to accept the unfavorable outcome and forgo additional litigation. In addition, prior state proceedings are likely to simplify subsequent litigation in federal court. Less discovery should be needed in most cases, and the issues will have been narrowed by the prior proceeding. Grievants who bring a federal action may stipulate to issues of fact that were determined in the state proceeding. Absent a stipulation, prior administrative findings may be admitted as evidence in federal actions under Fed. R. Evid. 803(8)(C). See *Chandler*, 425 U.S. at 863 n.39; cf. *Alexander*, 415 U.S. at 60 n.21.

On the other hand, if unreviewed state agency determinations had preclusive effect, grievants who

were in any doubt about the outcome of state administrative proceedings would have an incentive to abandon them after 60 days in order to preserve their right to bring an action in federal court. Many grievants could be expected to "bypass the opportunity for state EEOC exhaustion, which serves to terminate many cases without federal litigation." *Stillians*, 843 F.2d at 283 (Lay, C.J., dissenting). This would frustrate Congress's intent to encourage full use of state remedies in order to reduce the number of cases in which resort to the federal courts is necessary. See *Oscar Mayer*, 441 U.S. at 756. Cf. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 65-66 (1980) (Title VII). It would also upset the division of enforcement responsibilities between the EEOC and state agencies currently achieved through worksharing agreements, and increase the number of cases filed in federal courts.

To be sure, our understanding of the ADEA's deferral mechanism imputes to Congress an intent to favor unsatisfied employees over employers who have successfully defended against charges of age discrimination before a state agency. This is a choice that Congress made by giving employees, and not their employers, the right to opt out of agency proceedings after 60 days. In addition, the result for which we are arguing may lead to duplicative litigation in federal court following the completion of what may well have been entirely fair and comprehensive state proceedings. Of course, any decision denying preclusion carries the potential for duplicative litigation. Whatever the wisdom of this result, Congress is entitled to make this policy choice. In enacting the ADEA, Congress chose to adopt a statutory scheme

that is inconsistent with common law rules of administrative preclusion.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[16] The court of appeals did not reach the question whether DHR's proceedings satisfied the requirements for administrative preclusion. In accordance with *Elliott*, this question should be left for the courts below on remand if this Court decides to reverse the court of appeals' decision. See *Elliott*, 478 U.S. at 799 n.8.

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